UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
THE MORGAN GROUP, INC.,	)	CASE NO. 02-36046 HCD
MORGAN DRIVE AWAY, INC., and	)	JOINTLY ADMINISTERED
TDI, INC.,	)	CHAPTER 11
DEBTORS.	)	
	)	
	)	
LANDSTAR LOGISTICS, INC., and	)	
TRANSLINK, INC.,	)	
PLAINTIFFS,	)	
vs.	)	PROC. NO. 04-3101
	)	
LIBERTY MUTUAL INSURANCE COMPANY,	)	
MORGAN DRIVE AWAY, INC., VICTOR	)	
GARDNER and SHARON GARDNER,	)	
DEFENDANTS.	)	

Appearances:

Thomas P. Yoder, Esq., and Anne E. Simerman, Esq., counsel for plaintiffs, Barrett & McNagny LLP, 215 East Berry Street, P.O. Box 2263, Fort Wayne, Indiana 46801-2263;

Mark H. Wall, Esq., counsel for plaintiffs, Elmore & Wall, P.A., P.O. Box 1200, Charleston, South Carolina 29402;

Charles H. Gibbs, Jr., Esq., counsel for plaintiffs, Haynsworth Sinlker Boyd, P.A., P.O. Box 340, Charleston, South Carolina 29402-0340;

E. Lee Morris, Esq., James E. McGee, Esq., and William J. Moore, Esq., counsel for defendant Liberty Mutual Insurance Co., Munsch Hardt Kopf & Harr, P.C., 4000 Fountain Place, 1445 Ross Avenue, Dallas, Texas 75202-2790;

Irving M. Rosenberg, Esq., counsel for Victor and Sharon Gardner, Hesch, Rosenberg, Roberts, & Sherry, LLC, 420 Lincolnway West, Mishawaka, Indiana 46544;

James E. Rossow, Jr., Esq., and John M. Rogers, Esq., counsel for defendants Victor and Sharon Gardner, Rubin & Levin, P.C., 500 Marott Center, 342 Massachusetts Avenue, Indianapolis, Indiana 46204-2161; and

Andrew T. Kight, Esq., and Steven H. Ancel, Esq., counsel for defendant Morgan Drive Away, Inc., Sommer Barnard, PC, One Indiana Square, Suite 3500, Indianapolis, Indiana 46204-2023.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 30, 2005.

Before the court is the Complaint for Declaratory Judgment filed by Landstar Logistics, Inc. ("Landstar"), and Translink, Inc. ("Translink") (collectively, "plaintiffs"), on July 19, 2004, against Morgan Drive Away, Inc. ("Morgan" or "debtor"), Liberty Mutual Insurance Company ("Liberty"), and Victor and Sharon Gardner ("Gardners") (collectively, "defendants"). *See* R. 1. Liberty and the Gardners have filed Motions to Dismiss the Complaint and have supported their motions with memoranda of law. *See* R. 25, 26, 28, 29. The debtor joined in Liberty's Motion to Dismiss. *See* R. 31. After the plaintiffs filed their response to the dismissal motions and the Gardners and Liberty filed their replies, *see* R. 32, 33, 34, on November 17, 2004 the court took the matters under advisement.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(A) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The defendants Liberty and the Gardners filed motions to dismiss the plaintiffs' Complaint for Declaratory Judgment for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6) and Federal Rule of Bankruptcy Procedure 7012(b). When reviewing motions for

dismissal of a complaint, the court accepts all well-pleaded factual allegations in the complaint as true and draws all reasonable inferences in favor of the plaintiffs. *See Centers v. Centennial Mtg., Inc.*, 398 F.3d 930, 933 (7th Cir. 2005)*; Sneed v. Rybicki*, 146 F.3d 478, 480 (7th Cir. 1998). These are the background facts presented by the plaintiffs in their Complaint.

Each plaintiff is a corporation: Landstar is a Delaware corporation with its principal place of business in Jacksonville, Florida, and Translink is an Oklahoma corporation with its principal place of business in Broken Arrow, Oklahoma. Each plaintiff is a broker engaged in the business of locating and arranging motor carriers for clients needing transportation services. The defendant Morgan is an Indiana corporation with its principal place of business in Elkhart, Indiana, and it is engaged in the business of transporting goods. The defendant Liberty is a Massachusetts corporation with its principal place of business in Boston, Massachusetts. The defendants Victor and Sharon Gardner are individuals who reside in Charleston, South Carolina.

On or about May 21, 1996, Landstar and Morgan entered into a Transportation Brokerage Contract ("Contract"). *See* R.1, Ex. A. Under the Contract, Landstar agreed to tender shipments to Morgan and Morgan agreed to transport at least three shipments a year, depending on the availability of its equipment. The Contract extended for a period of 12 months and continued, year to year, until one party gave appropriate notice of termination. The Contract was in effect at all relevant times and governed the parties' relationship. According to the plaintiffs, the Contract required Morgan to carry specific insurance coverage and to name Landstar as an insured with respect to personal injury and property damage arising out of the ownership, maintenance, use or operation of Morgan's equipment.

On August 10, 2001, the Gardners filed a state court complaint in Charleston, South Carolina, and named the plaintiffs, Morgan, and other parties as defendants in that case. *See* R. 1, Ex. B. Their complaint alleged that Landstar, Translink, and the other named defendants were jointly and severally liable to the Gardners for injuries sustained by the Gardners when a tractor trailer carrying an oversized load came in contact with an overpass in Charleston County, South Carolina, on Interstate 26 on March 16, 2001. As a result of that impact,

an angle iron disengaged from the load and struck a trailing vehicle driven by Victor Gardner, allegedly injuring Victor Gardner.

That state court action was stayed as to the debtor Morgan but was proceeding against all the other named defendants. The alleged liability of Landstar and Translink, assert the plaintiffs, rests on the allegation that Morgan accepted the cargo that was involved in the accident from Landstar, by and through its contractual agent, Translink, as a motor carrier for the purposes of transporting the cargo.

On the date of the accident, a policy of liability insurance issued by Liberty to Morgan was in full force and effect. *See* R. 1, Ex. C ("the Policy"). Morgan is a named insured under that Policy. The Policy defines "Additional Insured" as "any person or organization for whom you [Morgan] are required by written contract to provide insurance." The plaintiffs informed Liberty of the Gardners' state court action and requested defense and indemnification under the Policy. By letter they asked that Liberty extend coverage under the Policy to them. However, Liberty declined or otherwise failed to defend and indemnify the plaintiffs.

The plaintiffs also stated in their Complaint that, on November 14, 2003, this court issued an "Order Approving Claims Resolution Procedures for Liquidating and Settling Certain Personal Injury and Property Damage Claims Through Direct Negotiations or Alternative Dispute Resolution." They alleged that the Gardners were subject to the Order but did not pursue claim resolution or opt out, as provided by the Order, "thereby prejudicing the Plaintiffs who would be entitled to certain protections thereunder." R. 1 at 5.

The plaintiffs asked this court to provide the following declaratory relief: (1) that the agreement to accept the cargo by Morgan was made expressly pursuant to the Transportation Brokerage Contract and that, under the Contract, Morgan expressly agreed to indemnify the plaintiffs to the full extent of the law; (2) that, pursuant to the indemnification agreement, Morgan and consequently its insurer are obligated to indemnify and hold the plaintiffs harmless; and (3) that, pursuant to the parties' relationship and the indemnification agreement, the plaintiffs are "insureds," "other insureds," or "additional insureds" under the Liberty Policy. The plaintiffs also specifically requested that the court (a) enter an order declaring that Morgan is required to indemnify the plaintiffs

and to hold them harmless in the Gardners' state action; (b) enter an order declaring that Landstar Logistics, Inc. and Translink, Inc. are "insureds" or "other insureds" under the Liberty Policy; and (c) stay or otherwise enjoin the Gardners from proceeding against either or both plaintiffs in the state court action until this court determines the issues raised by this Complaint.

Liberty's Motion to Dismiss, based on Federal Rule of Civil Procedure 12(b)(6), contended that the plaintiffs failed to establish any basis for the relief they sought against Liberty. It challenged the plaintiffs' two claims for relief, one under the theory of contractual indemnity pursuant to the Contract, and the other under the theory of insurance protection under the Liberty Policy. It suggested that the plaintiffs "are searching for any means possible to prevent the Gardner Action from going forward against them," but insisted that the plaintiffs' "reliance upon a totally unintelligible, unsigned form of Brokerage Contract, which does not even name either of the Plaintiffs as a party, coupled with their apparent reliance upon the allegations of the Gardner Complaint (as opposed to any independent allegations by the Plaintiffs themselves), is not sufficient to transform the Plaintiffs into insureds under the Policy or otherwise entitle them to protection under the Policy." R. 26 at 8-9.

On September 17, 2004, the debtor joined the Motion to Dismiss filed by Liberty. *See* R. 31.

The Gardners also filed a Motion to Dismiss. They asserted that the plaintiffs' Complaint was a second attempt to stay the Gardners' state court action. On February 2, 2004, in the debtor's main chapter 11 bankruptcy case, Landstar had filed a "Motion to Enforce the Automatic Stay Pursuant to 11 U.S.C. § 362(a) Invoked by the Debtor To Include Landstar Logistics, Inc., and Enjoin any Party From Seeking Relief Against Landstar Logistics, Inc." The court denied that motion in its Order of February 5, 2004.[1] According to the

[1] The Court's Order of February 5, 2004, denied Landstar's attempt to find protection under the umbrella of the debtor's automatic stay. *See* R. 777, Case No. 02-36046. The court found that the stay applies to debtors, not to non-debtor co-defendants such as Landstar, unless there are unusual circumstances. Landstar had not shown that it was an "interested party" or that there were unusual circumstances justifying protection of the stay. The stay generally does not stop lawsuits against non-debtor third parties, it said. The court refused to find that the illegible "Brokerage Contract" stated that Morgan was a contract indemnitor of Landstar. It determined that Landstar did not prove that it was entitled to the protection of the stay. "The court finds no procedural or (continued...)

Gardners, the court found that Landstar had failed to show that the Transportation Brokerage Contract created an indemnity obligation from the debtor to Landstar that would entitle Landstar to injunctive relief. The Gardners pointed out that the instant Complaint for Declaratory Judgment sought the same relief, a stay or injunction, and based its request on the same illegible "Transportation Brokerage Contract" that was attached to the earlier Landstar Motion. Because this court had determined in its Order of February 5, 2004, that Landstar (and by implication Translink) was not entitled to the injunctive relief it is seeking; and because Landstar and Translink are non-debtor third parties seeking injunctive relief which is not supported by the debtor, the defendants urged the court to dismiss the Complaint. They also pointed out that, even if the plaintiffs were entitled to indemnification, this court had ordered that the Gardners, having complied with the Claims Resolution Order and having attempted mediation unsuccessfully, were entitled to proceed with litigation to liquidate their claim against the debtor and any "affiliated parties."

Discussion

The issue before the court is whether the plaintiffs' Complaint is subject to dismissal for failure to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6); Fed. R. Bankr. P. 7012(b). Dismissal is appropriate only when a plaintiff has failed to allege facts sufficient to present a claim for relief even in the face of the court's acceptance of all the well-pled allegations and reasonable inferences in the plaintiff's favor.

> Dismissal is proper under Rule 12(b)(6) only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 21 L.Ed.2d 80 (1957). When ruling on a motion to dismiss, the court generally should consider only the allegations of the complaint. *Rosenblum v. Travelbyus.com Ltd.*, 299 F.3d 657, 661 (7th Cir. 2002). "A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." Fed. R. Civ. P. 10(c).

Centers v. Centennial Mtg., Inc., 398 F.3d 930, 933 (7th Cir. 2005). The court is obligated to accept as true all well-pleaded factual allegations in the complaint and to draw all reasonable inferences in favor of the plaintiff.

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[1](...continued)
substantive right by which this nonparty may invoke the protections of § 362 in this case." *Id.* at 3.

Id. (citing *Ogden Martin Sys. of Indianapolis, Inc. v. Whiting Corp.*, 179 F.3d 523, 526 (7th Cir. 1999)). Nevertheless, "to the extent that the terms of an attached contract conflict with the allegations of the complaint, the contract controls." *Id.* (citing *Rosenblum*, 299 F.3d at 661 ("The court is not bound to accept the pleader's allegations as to the effect of the exhibit, but can independently examine the document and form its own conclusions as to the proper construction and meaning to be given the material.")).

The plaintiffs have asked the court to consider its sole general inquiry, "whether the Plaintiffs have stated any possible claim for insurance coverage pursuant to the Brokerage Agreement, as alleged in the Plaintiffs' Complaint." R. 32 at 2. The court will address the plaintiffs' two requests for declaration: first, that Morgan is required to indemnify and hold harmless the plaintiffs in the state action; and second, that Landstar and Translink be identified as "insureds" or "other insureds" under the Liberty Policy. It will also consider the plaintiffs' request for an order staying or otherwise enjoining the Gardners from proceeding against either or both plaintiffs in the state court action until this court has determined the issues raised by the Complaint for Declaratory Judgment.

A. *Does the Complaint adequately allege that Morgan is required to indemnify the plaintiffs in the state court action?*

The plaintiffs asked the court to determine the obligations of the parties under the Contract attached to their Complaint as Exhibit A. The court examined the Contract and the "Retyped Landstar ITCO Inc. MC 281428 Transportation Brokerage Contract," initially, to determine whether it should rely on the retyped version in light of the lack of clarity of the original Contract.[2] Defendant Liberty objected to the court's consideration of the Retyped Contract as an unauthenticated version of the alleged contract. *See* R. 26 at 3 n.3.

[2] The court notes that, as an exhibit to its Motion to Enforce the Automatic Stay, Landstar proffered an illegible "Transportation Brokerage Contract" to show that Morgan was a contract indemnitor of Landstar. The court refused to interpret the unreadable document; it declined to find that there was an indemnity contract between the parties, and it denied Landstar's motion requesting protection of the automatic stay. *See* R. 777, Case No. 02-36046, Order of February 5, 2004. Landstar, in this adversary proceeding, has retyped the illegible Contract.

The court noted the smeared, blurred quality of the Contract and determined that it could not declare its meaning because it was an illegible document. *See, e.g.*, *Rowland v. Magna Millikin Bank*, 812 F. Supp. 875, 879 (C.D. Ill. 1992) (finding that the defendant failed to make material disclosures because the disclosures on plaintiffs' copy of the contract were blurred and illegible, not clearly and conspicuously made). The court also found that the plaintiffs, when retyping the Contract, misread or mistyped the unclear provision on which they intended to establish the debtor's indemnification obligation. As a result, paragraph 4(D) of the Contract, the provision referring to indemnification, was retyped with ungrammatical mistakes.[3] The crucial part of that paragraph, the court believes, should be a separate sentence starting with the word "except."[4] The court finds that it cannot read the illegible Contract and cannot rely upon the retyped Contract; it therefore cannot declare the indemnification rights of the plaintiffs seeking a declaration based upon that Contract.

Nevertheless, the Contract, in its heading, introductory paragraph, and handwritten insertions, is clear enough for the court to find that it is an agreement between the debtor Morgan Drive Away, designated as

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[3] The Retyped Contract provides the following wording for paragraph 4(D):

> "Carrier" agrees to defend and hold harmless "Broker" against loss, damage or delay claims on each shipment transported by "Carrier" pursuant to this contract and shall be liable as a common Carrier and insurer of the shipment. "Carrier" further agrees to defend and hold harmless "Broker" from any and all liability costs and damages arising out of "Carrier's" operations hereunder, including but not limited to all road, fuel, and other taxes, fees or operating permits, related to the shipments transported by "Carrier" or arranged by "Broker" except as otherwise provided herein, each party hereto shall indemnify and hold harmless the other party hereto from and against all loss, damage, fines, expense, actions and claims for injury to persons including injury resulting in death and damage to property, caused by the loss or omissions of such party, its agents of employees.

R. 1, Ex. A, p. 3, ¶ 4(D).

[4] The court believes that the last part of provision ¶ 4(D), with the corrected words underscored, should read:

> <u>Except</u> as otherwise provided herein, each party hereto shall indemnify and hold harmless the other party hereto from and against all loss, damage, fines, expense, actions and claims for injury to persons[,] including injury resulting in death and damage to property, caused by the <u>acts</u> or omissions of such party, its agents <u>or</u> employees.

"Carrier," and Landstar ITCO, designated as "Broker" in the Contract. The court makes the following findings of fact and conclusions of law concerning the legible portions of the Contract:

(1) The Contract is an agreement between the debtor and a nonparty to this proceeding. Landstar ITCO is the party to the Contract. Landstar Logistics, Inc., is the plaintiff in this adversary proceeding. Neither the Contract nor the Complaint recites facts stating the relationship between Landstar Logistics, Inc. and Landstar ITCO. Therefore, the court finds that the plaintiff Landstar is not a party to the Contract.[5]

(2) Translink is not a named party to the Contract. The plaintiffs asserted, in their Plaintiffs' Response to Defendants' Motions to Dismiss, that Translink was Landstar's contractual agent for the purpose of transporting cargo and that it was entitled to indemnification under the Contract through Landstar. However, the plaintiffs' Complaint does not so state. Instead, the Complaint states that each plaintiff is a transport broker, that both plaintiffs are named defendants in the Gardners' state court complaint, and that the state court action alleges their liability:

> The alleged liability of Translink and Landstar rests on the allegation that Morgan Drive Away accepted the cargo which was involved in the accident from Landstar, by and through its contractual agent, Translink, as a motor carrier for the purposes of transporting the cargo.

R. 1 at 4, ¶ 16. The plaintiffs' only evidence of Landstar's relationship to Translink rests on the Gardners' allegations. However, allegations contained in a pleading like the state court complaint are not evidence upon which the plaintiffs may rely. *See Federal Deposit Ins. Corp. v. Deglau*, 207 F.3d 153, 172 (3d Cir. 2000) (stating that the allegations of the plaintiffs' state court complaint are merely allegations, not evidence); *Florists' Nationwide Telephone Delivery Network v. Florists' Telegraph Delivery Ass'n*, 371 F.2d 263, 270 (7th Cir.), *cert. denied*, 387 U.S. 909 (1967) (stating that complaint allegations are mere accusations, not evidence). The court finds that the plaintiffs have failed to allege in their Complaint any facts concerning the agency relationship

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[5] The plaintiff admitted that it is not Landstar ITCO. In its Response, it explained that it was formerly known as Landstar ITCO. *See* R. 32 at 2. It stated that it could amend its Complaint to reflect the fact that it changed its name. However, the plaintiff did not request permission to amend, did not file an amended Complaint, and did not submit any evidence documenting that change of relationship. The court is "not obliged to accept as true unsupported conclusions of fact." *Sneed v. Rybicki*, 146 F.3d 478, 480 (7th Cir. 1998).

between the plaintiffs or their relationship with the debtor under the Contract which, if true, would entitle them to relief under the terms of the Contract.

(3) The Contract is signed only by a representative of Morgan and not by the other party, Landstar ITCO. Landstar Logistics responded, with case citations, that "only the party against whom the contract is being enforced need have signed" and that, "[s]ince it is undisputed that Morgan signed the Brokerage Agreement, there is simply no basis to dismiss the Plaintiffs' claims." R. 32 at 4.

The plaintiffs want to enforce this unsigned Contract against the debtor. In Indiana, "[t]he primary and overriding purpose of contract law is to ascertain and give effect to the intentions of the parties."[6] *Indiana-American Water Co., Inc. v. Town of Seelyville*, 698 N.E.2d 1255, 1259 (Ind. Ct. App. 1998) (*quoted in Centers*, 398 F.3d at 934). As a general principle, a written contract expresses the mutual intent of the parties when it is executed by the parties by affixing their signatures. Likewise, "there is nothing in the instrument to evidence an intention that the contract should bind those signing it until and unless it was signed" by the parties. *Hess v. Lackey*, 132 N.E. 257, 259 (Ind. 1921). This Brokerage Contract, lacking the signature of Landstar ITCO, was not a finally executed instrument. Nevertheless, the court notes, Morgan has not denied that it had a contractual relationship with Landstar ITCO. The court is not asked to find, and does not find, that the Contract was void or invalid because it lacked the Landstar ITCO signature. It finds simply that the Contract was incomplete.

However, the Contract's lack of signature disturbs the court for a different reason. The plaintiffs presented to the court, in separate pleadings, two different unsigned Transportation Brokerage Contracts, each equally illegible. The plaintiffs proffered the May 21, 1996 Contract, signed by Greg Anastasio(?), in its Complaint

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[6] The Contract at issue does not provide which state's law governs its interpretation, and the parties to the Contract did not apply the law of a particular state. *See Rockwell Int'l Corp. v. Feder Litho-Graphic Services, Inc. (In re Feder Litho-Graphic Servs., Inc.)*, 40 B.R. 486, (Bankr. E.D. Mich. 1984) (determining that Illinois law governed construction of brokerage contract). This court, sitting in Indiana, will follow basic Indiana law of contracts in reviewing the Contract. The court notes, however, that it is a general principle of contract law, one present in some form in all state laws, that the goal of contract construction is to determine the intent of the parties at the time they executed the contract.

for Declaratory Judgment now before the court. *See* R. 1, Ex. A. The plaintiffs asked the court to declare that, "[i]n that Brokerage Contract, Morgan Drive Away expressly agreed to indemnify the Plaintiffs to the full extent of the law." *Id.* at 5. However, in the debtor's main bankruptcy case Landstar proffered the February 1, 1996 Contract in its Motion to Enforce the Automatic Stay.[7] *See* R. 772 (Case No. 02-36046). That Contract was signed by Dave Morgusen(?) and contained strikeouts and notations for proposed changes. Landstar claimed, in that Motion, that "Morgan Drive Away is a contract indemnitor of Landstar Logistics pursuant to the Contract attached hereto." *Id.*

The court finds that there is no indication that the May 21, 1996 Contract, even though the later dated contract of the two, is the final Contract between the parties. It recognizes that the provisions of the Contract may have been altered in an even later executed Contract. *See Ocean Atlantic Dev. Corp. v. Aurora Christian Schools*, 322 F.3d 983, 997 (7th Cir. 2002) (finding that the parties' mutual obligations were dependent on execution of a final contract; refusing to deem the preliminary writing to be a binding agreement). The plaintiffs, nonsignatories to the Contract, have submitted two different Contracts to the court, each illegible and unsigned, each purported to be the "Transportation Brokerage Contract" demonstrating that the debtor is the contract indemnitor of the plaintiffs, and have asked the court to declare that they are indemnified by the Contract's provisions. The court determines that it cannot declare that the Contract attached to the plaintiffs' Complaint by its terms requires Morgan to indemnify the plaintiffs or hold them harmless.

The court, having taken all the plaintiffs' allegations in their Complaint to be true, determines that the Complaint has failed to allege facts sufficient to state a cause of action for contractual indemnity. It concludes that the plaintiffs can prove no set of facts arising from the illegible, incomplete Contract in support of their

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[7] In resolving a motion to dismiss, a court is entitled to take judicial notice of matters in the public record without converting the motion to dismiss into a motion for summary judgment. *See Palay v. U.S.*, 349 F.3d 418, 425 n.5 (7th Cir. 2003). Public records include public court documents. *See Henson v. CSC Credit Servs.*, 29 F.3d 280, 284 (7th Cir. 1994). The court took judicial notice of the Brokerage Contract in the court's record in the main case of the debtor Morgan Drive Away, Inc. It had found that Contract illegible in its Order of February 5, 2004. *See* R. 777, Case No. 02-36046.

indemnity claim which would entitle them to relief. Accordingly, dismissal of the contractual indemnity claim is proper.

B. *Does the Complaint adequately allege that Landstar Logistics, Inc. and Translink, Inc. are "insureds" or "other insureds" under the Liberty Policy?*

The plaintiffs assert that the Liberty Policy was in full force and effect on the date of the accident, that Morgan was a named insured under the Policy, and that the plaintiffs are "any person or organization for whom you [Morgan] are required by written contract to provide insurance." R. 1 at ¶¶ 17-20. The court turned to the Liberty Policy to determine whether the plaintiffs were covered as "insureds" under the Policy. It states:

1. WHO IS AN INSURED. The following are insureds:

> a. You for any covered auto.
>
> b. Anyone else while using with your permission a covered auto you own, hire or borrow [subject to certain exceptions which are not applicable].
>
> c. The owner or anyone else from whom you hire or borrow a covered auto that is a trailer while the trailer is connected to another covered auto that is a power unit or, if not connected: (1) is being used exclusively in your business as a trucker; and (2) is being used pursuant to operating rights granted to you by a public authority.
>
> d. The owner or anyone else from whom you hire or borrow a covered auto that is not a trailer while the covered auto: (1) is being used exclusively in your business as a trucker; and (2) is being used pursuant to operating rights granted to you by a public authority.
>
> e. Anyone else who is not otherwise excluded under paragraph b. above and is liable for the conduct of an insured but only to the extent of that liability.

R. 1, Ex. C at 226. "You" is defined as the "Named Insured shown in the Declarations" section of the Policy. *See id.* at 225. The Declarations section identifies the "Named Insured" under "Endorsement 1." That Endorsement lists a number of Group affiliates, none of which is Landstar or Translink.[8] *See id.* at 20.

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[8] The Named Insured Endorsement, in the Policy issued by Liberty to Morgan, lists the following persons or organizations included as "Named Insureds":

(continued...)

The court finds that the Complaint does not allege that the tractor trailer involved in the Gardners' accident was a "covered auto" used by Morgan or by others with its permission. Nor does it make other allegations that might bring the plaintiffs within the definition of "insured" in the Policy. The plaintiffs relied on the allegations found in the Gardners' state court complaint; however, those allegations are not the plaintiffs' allegations (which the court must accept as true) and are not evidence in this adversary proceeding. The court also finds that the relationship between Morgan and the plaintiffs was not sufficiently established to demonstrate the plaintiffs' entitlement to coverage as "insureds" under the Policy.

The Policy also includes "additional insureds." The Policy states:

> It is agreed that such insurance as is afforded by the policy for Bodily Injury Liability and for Property Damage Liability also applies to the person or organization named below, as an insured, with respect to the use of the automobile by the named insured or with his permission . . . .
>
> > Additional insured: Any person or organization for whom you [a named insured] are required by written contract to provide insurance.

R. 1, Ex. C at 31. The plaintiffs claim that the Contract requires Morgan to indemnify the plaintiffs and to provide insurance for them. However, the court already has found that neither of the plaintiffs is a party to the Contract and that the Contract is illegible and may not have been the final binding agreement between the parties. The court again finds that the Contract cannot be read or interpreted to include an indemnification agreement between Morgan and the Plaintiffs; therefore, it declines to find that the plaintiffs are "additional insureds" under the Liberty Policy. The court cannot declare the rights and legal relations of these plaintiffs seeking declaratory judgment based upon the Contract and Liberty Policy appended to their Complaint.

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[8](...continued)

> The Morgan Group, Inc.; Morgan Drive Away, Inc.; Morgan Finance, Inc.; Home Transport Corporation; Lynch Corporation; TDI, Inc.; Transamerican Carriers, Inc.; Transport Services Unlimited; Interstate Indemnity, Inc.; Transit Homes, a Division of Morgan Drive Away, Inc.; Morgan First Class Transportation, Operated by TDI, Inc.

R. 1, Ex. C at 20.

In sum, the court finds that the plaintiffs can prove no set of facts arising from their Complaint, the Policy, or the Contract in support of their insurance coverage claim which would entitle them to relief. It concludes that the allegations in their Complaint were not sufficient to survive the motions for dismissal and thus that dismissal of the insurance claim is proper.

C. *Does the Complaint adequately allege facts sufficient to stay or enjoin the Gardners from proceeding against the plaintiffs in the state court action?*

The court declined to stay or otherwise enjoin the Gardners from proceeding against the plaintiffs in the state court action until the court had determined the issues raised by this Complaint. Now that the court issues this Memorandum of Decision and Judgment, determining the issues raised by the plaintiffs' declaratory judgment complaint, it denies as moot the plaintiffs' request for injunctive relief.

Conclusion

For the reasons presented above, the court denies the Complaint for Declaratory Judgment filed by Landstar Logistics, Inc. and Translink, Inc. It grants the Motions to Dismiss filed by Liberty Mutual Insurance Company (and joined by the debtor Morgan Drive Away, Inc.) and by Victor and Sharon Gardner pursuant to Federal Rule of Civil Procedure 12(b)(6) and Federal Rule of Bankruptcy Procedure 7012(b).

SO ORDERED.

JSO1

HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT